COMMONWEALTH of VIRGINIA

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December 16, 2004

Dr. James Reinhard, Commissioner
Virginia Department of Mental Health, Mental Retardation
And Substance Abuse Services
1220 Bank Street
Richmond, VA 23219

Dear Dr. Reinhard:

I write to provide you with preliminary findings of VOPA's investigation to determine whether the Department of Mental Health, Mental Retardation and Substance Abuse Services ("DMHMRSAS") neglects people with mental illness by failing to appropriately conduct and/or supervise discharge planning for persons with mental illness deemed "ready for discharge" from DMHMRSAS' institutions. I do so in the hope that our offices will be able to work together to address, and hopefully resolve, the issues we identify in this letter. Please note that our investigation is not complete and we continue, as I know you do, to look for ways to ensure that people with mental illness are served in the most integrated setting, as required by law.

Legal Requirements.

The Americans with Disabilities Act, like Section 504 of the Rehabilitation Act, requires that people with disabilities receive services in the most integrated setting appropriate to their needs. See, 28 C.F.R. § 35.130 (ADA Regulations); 28 C.F.R. § 41.51 (Section 504 Regulation). The United States Supreme Court has held that the ADA and Section 504 require states to ensure that people with disabilities who live in institutions but are capable of living in the community be served, whenever possible, in community settings. See, Olmstead v. L.C., 527 U.S. 581, 597-603 (1999) (holding that, under the ADA and Section 504, "unjustified institutional isolation" is unlawful discrimination based on disability).

In Virginia, DMHMRSAS, through the Commissioner, operates and supervises institutions for persons with mental illness and mental retardation. Va. Code Ann. § 37.1-42.1. DMHMRSAS and Community Services Boards ("CSBs"), which operate under the supervision of DMHMRSAS, share responsibility for conducting discharge planning for people who are "ready for discharge" from institutions. See, Va. Code Ann. § 37.1-98, *et seq.*.

II. Factual Background.

In 2003, we received fifty-five complaints from persons with mental illness stating that DMHMRSAS did not establish or implement appropriate discharge plans for them. We also received complaints from advocates for persons with mental illness and four DMHMRSAS employees all stating and corroborating that DMHMRSAS does not establish or implement appropriate discharge plans.

We then commenced an investigation to determine whether DMHMRSAS neglects people with mental illness who were "ready for discharge" from its institutions by failing to create or supervise the creation of appropriate discharge plans. In furtherance of the investigation, we requested that DMHMRSAS provide us with a copy of its "extraordinary barriers database."

After DMHMRSAS refused to provide us with the database and all attempts at settlement failed, we filed suit in the United States District Court for the Eastern District of Virginia seeking an Order requiring DMHMRSAS to provide us with that record. After the Court entered a Preliminary Injunction in our favor, we resolved the litigation. The parties entered into a Final Order enjoining DMHMRSAS to provide us, upon request, with the names and contact information for those persons with mental illness deemed "ready for discharge" from its institutions, and the contact information for their guardians (if any), until January of 2006.

Since the entry of the Final Order, we have been conducting our investigation. We have made several preliminary findings, which are summarized below.

III. Preliminary Findings.

Our investigative work thus far suggests that DMHMRSAS fails to create, implement or supervise the creation and implementation of appropriate discharge plans for people with mental illness deemed "ready for discharge" from DMHMRSAS' institutions. This failure occurs in three main aspects:

- Failure to identify appropriate community placements;

  Failure to conduct individualized discharge planning and comply with the Discharge Planning Protocols; and

  Failure to provide appropriate education and training to help consumers progress toward discharge and to succeed in community placements.

Failure to Identify Appropriate Community Placements.

The evidence we have reviewed suggests that the primary barrier to discharge for persons with mental illness is the failure, by treatment teams, to identify appropriate community placements. The vast majority of cases we reviewed called for placements in Assisted Living Facilities (ALFs) that were wholly inappropriate for the needs of the people to be discharged to them. In addition, because the same ALFs are continuously identified as placements, there is often an interminably long waiting list for them. Even worse, we have reviewed cases where a consumer's placement was identified as an ALF which had previously refused to accept persons displaying symptomologies like those displayed by the consumer.

ALFs are often identified at the beginning of the discharge planning process as the only possible discharge location, without any input from the consumers themselves. In many cases, treatment teams will only identify two or three possible placements, all of which are ALFs, and never look for any other placements. This occurs even when it is clear that a consumer can live in a more integrated setting than an ALF or that an ALF is otherwise inappropriate. It appears that this is the result of a lack of knowledge of other potential placements or a refusal to seek out other possible placements. There appears to be little to no collaboration between treatment teams, consumers and other stakeholders to identify placements. As a result, treatment teams may not know of appropriate placements and attempt to place persons in inappropriate ALFs.

The failure to locate appropriate placements is worsened by a failure or refusal to seek out-of-catchment placements. The discharge plans we have reviewed often identify or consider only local placements – nearly always ALFs - even when consumers state that they would accept a placement outside of their CSB's catchment area. As a result, if the locally identified placement has a waiting list or refuses the consumer, the individual is forced to remain in the institution even though all parties agree that he or she should live in the community.

Failure to Conduct Individualized Discharge Planning and Comply with Discharge Protocols.

The evidence we have reviewed also suggests that treatment teams fail to conduct individualized discharge planning and do not comply with DMHMRSAS' Discharge Planning Protocols. As a result, people are placed (or sought to be placed) in settings that are not appropriate to them and are not discharged in a timely manner, if at all.

DMHMRSAS' Discharge Planning Protocols require treatment teams to address and overcome barriers to discharge prior to an individual being deemed "ready for discharge." Hence, by the time a person is deemed "ready for discharge," no such barriers should remain.

However, the records we have reviewed indicate that, in many cases, the same barriers continue, unaddressed, throughout a person's stay in an institution and often are the same barriers preventing discharge. Even worse, treatment teams seem to identify potential placements – nearly always the same ALFs they routinely identify – without regard to the barriers displayed by the person. A frequent result is the identification of a placement that has

previously refused to accept people who display barriers like those displayed by the consumer. This pattern suggests that treatment teams are not conducting individualized discharge planning – planning focused on individual needs and designed to overcome individual barriers to discharge. Instead, a "cookie cutter" approach has been chosen, seemingly in an attempt to make individuals "fit" into a predetermined placement rather than finding placements appropriate for the individuals.

Furthermore, even though the Discharge Planning Protocols require treatment teams to work closely with consumers and their families to locate appropriate placements, many people we interviewed report having little or no input into their discharge plans. Several were unaware that they are "ready for discharge." Many who are aware that they are "ready" could not identify their discharge placement. This evidence suggests that treatment teams routinely fail to communicate or collaborate with consumers - a blueprint for inappropriate placements and failed discharges. Put simply, unless treatment teams work closely with consumers, their family members and other stakeholders, they will be unable to locate appropriate placements or conduct appropriate discharge planning.

Failure to Provide Appropriate Education and Training.

In many cases, consumers who are "ready for discharge" either are not discharged or are discharged to inappropriate placements due to "barriers" that pre-existed their admission to the institution. For example, consumers who have a "behavior" barrier at admission do not receive appropriate education or training designed to overcome that barrier. As a result, the person, once "ready for discharge," is excluded from what would otherwise be appropriate placements due to his or her "behaviors." These persons are then either not discharged at all or discharged to needlessly restrictive settings.

This failure to address barriers to discharge violates DMHRMRSAS' Discharge Protocols, which direct treatment teams to provide education and training to help individuals overcome those barriers. While we are aware of, and applaud, the array of programs DMHMRSAS does provide, our review suggests that treatment teams do not provide the individually-focused education and training necessary to help consumers circumvent their barriers to discharge. For example, treatment teams could, and should, provide education and training designed to help consumers develop life-skills necessary to succeed in the community. Programs focusing on money management, transportation and employment skills would help individuals live with greater independence and avoid unnecessarily restrictive placements in nursing homes and ALFs. These programs could be provided by treatment teams in conjunction with other state agencies such as the Department of Rehabilitative Services.

IV. Recommendations.

Our preliminary findings suggest that DMHMRSAS is neglecting those persons with mental illness deemed "ready for discharge" from its institutions by failing to create or supervise the creation of appropriate discharge plans. If DMHMRSAS is neglecting those persons, it is

also violating their rights under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. While our findings are not final, we believe that DMHMRSAS should take the following steps to ensure that appropriate discharge plans are created:

- DMHMRSAS must ensure that a wide variety of placements are identified and considered before an individual is deemed "ready for discharge" so that when a person is ready, he or she will have access to placements that are appropriate for their abilities and needs;

- DMHMRSAS must ensure that treatment teams consider the needs and desires of consumers and receive their input prior to identifying prospective placements; and

- DMHMRSAS must ensure that treatment teams provide appropriate education and training services to assist consumers overcome discharge barriers and succeed in appropriate community settings.

Our broad-based findings and recommendations are designed to stimulate dialogue between our offices so that we can work collaboratively to ensure that persons with disabilities are served in the most integrated setting appropriate to their needs. It is my hope that you will meet with VOPA to discuss ways DMHMRSAS can operationalize and implement the recommendations we have made.

Thank you, in advance, for your consideration of our concerns and for working with us to overcome them. If you have any questions or wish to schedule a meeting, please contact Jonathan G. Martinis, at (804) 662-7115.

Sincerely,

V. Colleen Miller
Executive Director

CC: Jane D. Hickey, AAG

COMMONWEALTH of VIRGINIA

DEPARTMENT OF
MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE SERVICES

JAMES S. REINHARD, M.D.
COMMISSIONER

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January 12, 2005

V. Colleen Miller, Executive Director
Virginia Office for Protection and Advocacy
1910 Byrd Avenue, Suite 5
Richmond, Virginia 23230

Dear Ms. Miller:

Thank you for sharing your preliminary findings of VOPA's investigation on the discharge planning process in state mental health facilities for consumers deemed ready for discharge. I appreciate your willingness to work together to address the issues regarding discharge planning that you have identified in your letter. The Department is interested in every opportunity to make this system better for our consumers.

It should be noted that the Community Services Boards (CSBs) are under the administrative supervision of their local Boards of Directors or local government. The Department does however share a leadership role with the CSBs in transforming the mental health, mental retardation and substance abuse system of care into one that is more community-oriented and recovery based.

For a number of years, the Department has monitored the discharge process at state psychiatric facilities from a variety of perspectives. A number of efforts to improve the timeliness and quality of the discharge planning process have been, or will be, initiated. These efforts include, but are not limited to, the following:

- As part of our statewide and regional planning, the Department in collaboration with the CSBs is in the process of revising the Discharge Protocols. The revision will place an emphasis on consumer choice and recovery. We welcome your participation and feedback into the process.

- The Office of Mental Health Services will be hiring an additional staff person to work with both facilities and CSBs to enhance the discharge planning process, provide technical assistance, and monitor the progress of discharge planning throughout our system.

- Each of the planning regions has developed and implemented, or are in the process of developing, a review/oversight census management committee. These committees collectively work towards managing census, improving the discharge planning process, and increasing the dialogue among consumers, CSBs, treatment teams and private providers. These committees also review, endorse, and revise Discharge Assistance Project (DAP) regional allocations.

- By spring of 2005, the Department will begin to implement "secure site" discharge planning. Through this process, CSBs and treatment teams will have secure site database access to the charted documentation related to the discharge planning process such as: Needs Upon Discharge, the Discharge Plan, the Crisis Plan, Extraordinary Barriers to Discharge Reports and CSB Discharge Planning Notes. This not only will provide "real time" access to the discharge planning process by the instrumental parties but will also enhance quality control for review of the process by CSBs and state facility supervisors, as well as Central Office staff.

- The Department's mental health facilities have been most committed to providing psychosocial rehabilitation (PSR) groups that are consumer focused and lead to the appropriate education and training necessary for successful community placement. Many of our PSR programs have received national recognition.

To reiterate, the Department welcomes the opportunity to work collaboratively with you to ensure the most appropriate discharge planning and placement for Virginians with mental disabilities. I strongly believe that we both share a commitment to recovery, self-determination and consumer empowerment principles.

Please feel free to have Mr. Jonathan Martinis contact An-Li Hoban of my office to coordinate a meeting time between VOPA and Department staff. She may be reached at 786-3921. I look forward to the discussion.

Sincerely,

James Reinhard

James S. Reinhard, M.D.

JSR/rb

c: Jane D. Hickey
Frank Tetrick
Jim Martinez
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August 26, 2005

Ms. V. Colleen Miller, Executive Director
Virginia Office for Protection and Advocacy
1910 Byrd Avenue, Suite 5
Richmond, VA 23230

Dear Ms. Miller:

Thank you for the opportunity you recently to meet with you and Jonathan Martinis regarding our discharge planning efforts and other initiatives the Department has embarked upon. I left the meeting optimistic that we can work together in a collaborative and synergistic relationship, committed to system improvements.

Since last writing you in January 2005 the Department has taken the following steps in expanding our practices related to discharge planning:

- The revision of the Statewide Discharge Protocols has been completed and is now ready for statewide committee review scheduled to begin in September 2005.
- The Office of Mental Health has hired a new staff person who began employment in June 2005. This individual's responsibilities will include expanded focus on discharge issues and regional efforts in this regard.
- The development of an Electronic Secure Discharge Planning Site is being pilot tested at Southwestern Virginia Mental Health Institute. It is anticipated that the pilot will be completed in October 2005 with statewide implementation to begin in November 2005.
- "Quality" review of discharge planning efforts continues regionally with training provided to the region where needs are identified.
- We have initiated work with the Department of Rehabilitative Services on training and supports relative to an increased emphasis on employment in the discharge planning process.

In addition, I would like to reiterate from our meeting the areas where we agreed our joint efforts could best benefit our common consumers. These include:

- Provision of training by the Department on discharge planning, protocols and barriers issues to VOPA administrative and field staff.

- The appointment of a VOPA representative to work with the statewide committee on the final discharge protocol revisions process. The revised protocols will become the operational policy at state facilities and will be incorporated into the Community Services Boards' contracts.

- Our Office of Mental Health services and Office of Forensic Services will collaborate with VOPA's lead attorney on "pilot" NGRI cases.

- The Department employment training efforts with the Department of Rehabilitative Services will include VOPA representation in training and post training work plans for staff.

- VOPA staff will be invited to attend various regional census management and discharge planning forums.

We will welcome the opportunity to work together with VOPA on the development of a Web-based consumer/provider friendly single site residential reference source.

Given the many opportunities for collaboration, ongoing discussion and sharing of information, I am confident our consumers will receive service products that reflect our joint philosophy in support of self-determination.

I welcome any comments you may have concerning the update of our activities.

Sincerely,

James S. Reinhard, M.D.

cc: Jane Hickey
Allyson K. Tysinger
Ray Ratke
Frank Tetrick
Jerry Deans
James Evans, M.D.
Paul Guilding
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